LFC Requester:	Kelly Klundt

AGENCY BILL ANALYSIS
2016 REGULAR SESSION

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

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{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION
{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:
Original X **Amendment** ____
Correction ___ **Substitute** ____

Date February 3, 2016
Bill No: SB 269

Sponsor: Senator Mark Moores
Short Title: Employee Preference Act

Agency Code: 305
Person Writing Sally Malavé, AAG
Phone: 827-6031 **Email** smalave@nmag.gov

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY16	**FY17**		

(Parenthesis ( ) Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY16	**FY17**	**FY18**		

(Parenthesis ( ) Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: None at this time.
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

This analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Letter. This is a staff analysis in response to an agency's, committee's, or legislator's request.

Synopsis:

SB 269 creates the "Employee Preference Act" and makes it the public policy of the state that all persons shall have the right to join or to refrain from joining a labor organization.

Section 4 prohibits a public employer from requiring a public employee to become or remain a member of a labor organization, or to pay dues, fees, assessment or other charges to a labor organization or third party, as a condition of hiring, promotion, or continued employment.

Section 5 prohibits an employer from requiring a prospective employee to be vetted by labor organization as a condition of hiring, promotion, or continued employment.

Section 6 renders unlawful an agreement between an employer and a labor organization which is in violation of the Act.

Section 7 tasks the Attorney General and District Attorneys with the duty to investigate complaints alleging violations of the Act as well as prosecute suspected violations of the Act.

Section 8 authorizes the Attorney General and District Attorneys to seek injunctive relief in the county where the violation of the Act is occurring or will occur.

Section 9 makes a violation of any provision of the Act a misdemeanor punishable by a fine not to exceed $1,000 or imprisonment not to exceed 90 days.

Section 10 creates remedies for any person injured or threatened with injury as a result of a violation of the Act, including injunctive relief and any all damages of any character, including costs and attorney's fees, resulting from the violation or threatened violation.

Section 11 exempts the following from the Act's requirements: (1) employers and employees covered by the Federal Railway Labor Act; (2) federal employers and employees; (3) employers and employees of exclusive federal enclaves; (4) provisions of the Act that conflict with federal law; and (5) employment contracts entered into prior to the Act.

SB 269 also amends various sections of the Public Employee Bargaining Act, NMSA 1978, Section 10-7E-1 to -26 (2003 and as amended), to make it consistent with the Employee

Preference Act. It deletes the definition of "fair share", and adds a provision prohibiting a public employer from requiring a public employee to become or remain a member of a labor organization, or to pay dues, fees, assessment or other charges to a labor organization or third party, as a condition of hiring, promotion, or continued employment. Section 17 amends Section 10-7E-26 by making its provisions prospectively applicable to an existing ordinance providing for public employee bargaining.

FISCAL IMPLICATIONS
May have fiscal implications for this office, as SB 269 contemplates that the Attorney General or a district attorney shall investigate complaints of violations and civilly or criminally enforce its provisions.

SIGNIFICANT ISSUES
A significant issue raised by SB 269 is whether the state has the authority to compel labor organizations to represent all members of a bargaining unit even when nonmembers do not pay dues. Under federal law, a union has a duty to fairly represent all workers of a bargaining unit, whether or not the employee members belong to a union. This is the duty of fair representation and the duty exists with respect to all union activity, including grievance and arbitration. Sweeney v. Pence, 767 F.3d 654, 672 (7th Cir. 2014) (dissent) (citing Vaca v. Sipes, 386 U.S. 171, 177 (1967)). Under SB 269, unions will still have the duty to fairly represent all members of a bargaining unit, even those who choose not to pay union dues.

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the U.S. Supreme Court ruled that to the extent service charges are used to finance expenditures by a labor organization for collective bargaining, contract administration, and grievance adjustment purposes, an agency shop or "fair share" clause is valid. Since *Abood*, there have been several challenges to state legislation enacting right-to-work laws. The most common arguments are that these laws are preempted by federal labor law and that the laws violate several constitutional provisions, including the Fifth Amendment's Taking Clause, the Equal Protection Clause of the Fourteenth Amendment, the Contracts Clause, and the First Amendment. Most courts have found that the states' authority to enact right-to-work laws are not contrary to federal labor law because Congress has granted states the authority, under Section 14(b) of the National Labor Relations Act, to create right-to-work laws.

In January 2016, the United States Supreme Court accepted certiorari and heard argument in the case of *Friedrichs v. California Teachers Association*, No. 14-915. A decision in now pending on the questions whether *Abood* should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment; and (2) whether it violates the First Amendment to require that public employees affirmatively object to subsidizing non-chargeable speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech.

PERFORMANCE IMPLICATIONS May have performance implications for this office, as SB 269 contemplates that the Attorney General or a district attorney shall investigate complaints of violations and civilly or criminally enforce its provisions.

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP None at this time.

TECHNICAL ISSUES None.

OTHER SUBSTANTIVE ISSUES None.

ALTERNATIVES None.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL Status quo.

AMENDMENTS